

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 MARSHALL DIVISION

4 DATATREASURY CORPORATION ) (

5 ) ( CIVIL DOCKET NO.

6 ) ( 2:13-CV-431-JRG-RSP

7 VS. ) ( MARSHALL, TEXAS

8 ) (

9 FISERV, INC., ET AL. ) ( FEBRUARY 12, 2014

10 ) ( 10:00 A.M.

11 MOTION HEARING

12 BEFORE THE HONORABLE JUDGE ROY S. PAYNE

13 UNITED STATES MAGISTRATE JUDGE

14  
15 APPEARANCES:

16 FOR THE PLAINTIFFS: (See sign-in sheets docketed in  
17 minutes of this hearing.)

18 FOR THE DEFENDANTS: (See sign-in sheets docketed in  
19 minutes of this hearing.)

20 COURT REPORTER: Ms. Shelly Holmes, CSR  
21 Official Reporter  
22 United States District Court  
23 Eastern District of Texas  
24 Marshall Division  
25 100 E. Houston Street  
Marshall, Texas 75670  
(903) 923-7464

(Proceedings recorded by ECRO, transcript produced on a CAT  
system.)

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I N D E X

February 12, 2014

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1 LAW CLERK: All rise.

2 THE COURT: Good morning. Please be seated.

3 We are here today for the status conference in the  
4 DataTreasury versus Fiserv case, which is 2:13-431 on our  
5 docket.

6 Would counsel state their appearances for the record?

7 MR. GILLILAND: Derek Gilliland with Christian Hurt  
8 and Johnny Ward on behalf of the Plaintiff, DataTreasury  
9 Corporation.

10 THE COURT: All right. Thank you.

11 MR. SMITH: Your Honor, to start off, from the  
12 Defendants' side, Michael Smith, Dave Roodman, and Emma Harty  
13 for the 431 Defendants, with the exception of the ones that we  
14 listed on the sign-in sheet.

15 THE COURT: All right. Thank you, Mr. Smith.

16 MR. DAVIS: Tom Davis in the 431 case for East Texas  
17 Financial, Citizens Bank, DirectTex Holding, Gladewater, and  
18 Computer Science Professionals, Inc. (sic).

19 THE COURT: Thank you, Mr. Davis.

20 Anyone else?

21 MR. ROBERTS: Your Honor, Randy Roberts for DATCU  
22 Credit Union.

23 THE COURT: Thank you, Mr. Roberts.

24 MR. GILLAM: Gil Gillam for Bankers -- Bancorp of  
25 Oklahoma and Bankers Bank, Your Honor. Ready.

1 THE COURT: Thank you, Mr. Gillam.

2 MR. MANN: Your Honor, Mark Mann here for Citizens  
3 National Bank in Henderson, Citizens Bancshares in this case  
4 only, in the 431 case.

5 THE COURT: All right. Thank you, Mr. Mann.

6 MR. HOSCH: Charles Hosch for Advanced Federal Credit  
7 Union.

8 THE COURT: Thank you.

9 All right. Mr. Smith, I think we're -- we're all  
10 gathered here on your emergency motion, so I'll give you the  
11 floor.

12 MR. SMITH: Thank you, Your Honor.

13 This is a peculiar situation, and that's why we filed  
14 the motion that we did. We thought it was necessary to raise  
15 the issue with the Court.

16 In January, the Court had a status conference for two  
17 cases that involved two -- in -- in this litigation that had  
18 two providers and about 81 Defendants, and the Court gave that  
19 a trial setting of 13 months from the date of the status  
20 conference with the Markman about six months away.

21 The next day, the Court consolidated a lead case into  
22 it, and that's the case that my clients are in. And that lead  
23 case was not ready for a status conference. It still had a  
24 number of Defendants that hadn't been served, had not appeared.  
25 There hadn't been a notice of readiness. So we were brought

1 into a case, and the way the Court's schedule works, that  
2 contemplates that we would have gotten infringement contentions  
3 sometime before.

4 As the briefing that was concluded last night informed  
5 Your Honor, the Defendants actual -- the Plaintiff actually  
6 provided infringement contentions on February the 7th, which  
7 put us seven weeks -- put us seven weeks behind where we would  
8 normally expect to be, and that's not counting the parties that  
9 had not been served.

10 Now, we got some more information. The -- the  
11 Plaintiffs did some work getting some parties served. One  
12 party appeared, one party settled. There are still six parties  
13 in -- in the -- the 431 that have not yet appeared. Two are  
14 due to answer on the 20th. Two, from my discussions with  
15 Plaintiff's counsel, are due to answer probably around the end  
16 of February, but there are two more, WCM and Veritext, who are  
17 parties that signed the motion that we're here on. And -- and  
18 for the record, that's Docket 177, Page 12. Their lawyers  
19 signed that asking for the status conference after therein.

20 Their answer date is about April the 8th. So had this  
21 case proceeded under the normal schedule, we would have had a  
22 status conference on the 431 in May, and we believe that due to  
23 the circumstances of the case and in order to allow people to  
24 get into the case, we need some relief on some of the dates.  
25 We have a number of parties who aren't getting the time that

1 they need who aren't even before the case at this point.

2 Now, with respect to the specific relief that we're  
3 asking for, we didn't have that in our motion because we didn't  
4 have the facts regarding -- well, let me -- let me back up.

5 We had asked the Court for a status conference. The  
6 Court set this motion for a hearing, but you just referred to  
7 it as a status conference. Do you want me to tell you what we  
8 want, or -- or -- or am I overstepping what the Court wants to  
9 hear?

10 THE COURT: I always want you to tell me what you  
11 want.

12 MR. SMITH: What I want, Your Honor, is to move the --  
13 move the case so that the Markman, instead of being in July, is  
14 December, and the trial setting, instead of being February, is  
15 in July. That would be a five-month extension. That would  
16 move us from a -- from 13 months from January to -- to 18  
17 months. But if you look at when we actually would have come up  
18 for a status conference, we would have come up otherwise in  
19 May. It only gives us one more month than if you had given us  
20 a 13-month trial setting then.

21 We believe that's appropriate because in this case,  
22 unlike the case that the Court gave us the trial setting in,  
23 we're now up to 130 Defendants, at least double the providers  
24 that were in the case when the Court gave us that date. The  
25 Court knows from the discovery order that we put in pursuant to

1 the Court's order, we -- the Plaintiff is going to be able to  
2 take up to 2,600 hours of depositions. We have 70 Defendant  
3 groups. And a few days ago, we got a list of the potential  
4 witnesses from the Plaintiff. Nobody has been able to count  
5 those, but in the 444 pages, it works out to about 2,400  
6 witnesses.

7           Given the past history of this litigation, we  
8 anticipate the Plaintiffs will depose probably three people per  
9 individual bank. So this isn't a case where they're not going  
10 to take the depositions. We think they're going to take a lot  
11 of depositions. So this particular case, we believe, is not a  
12 good candidate for a 13-month to trial from January which was  
13 still three -- three months away from the last of the  
14 Defendants answering in the case.

15           And that's all I have, Your Honor. I'm happy to  
16 answer any questions if the Court has any.

17           THE COURT: Well, I'll -- I'll just tell you a couple  
18 of things. The ordinary procedures in the ordinary case might  
19 contemplate that the Court would wait until all parties have  
20 been served and appeared. But at some point, the Court has an  
21 independent interest in moving its docket. This case was filed  
22 more than eight months ago, and it is at -- at this point the  
23 Court has to step in and move things.

24           The fact that there are some few Defendants who have  
25 not yet appeared cannot hold the case up indefinitely. If and

1 when those Defendants appear, if they need relief that can't be  
2 given within the structure of the current schedule, then the  
3 Court has the option of simply severing them out, putting them  
4 on their own track, but the Court doesn't have any way of  
5 knowing when those people will ever be served and when they'll  
6 appear. And so you should not expect that we simply won't act  
7 until all of the Defendants in a multi-Defendant case have  
8 appeared.

9 But the -- the point you raise about whether or not  
10 the schedule allows sufficient time is -- you know, that's the  
11 point that the Court wants to address.

12 How many months may be allowed from the date of the  
13 scheduling conference to the trial in a certain case -- I mean,  
14 a lot of that is simply dictated by the Court's schedule in the  
15 other cases. There's nothing magic about any certain number of  
16 months, so I'm -- I don't feel the need to give the -- the 431  
17 case the same number of months from any certain date until  
18 trial as the 432 or 433 case got.

19 The question is, is there any reason the case can't be  
20 ready within that schedule? But -- so if -- if you want to  
21 further address those issues, I'm -- I'm wide open to listening  
22 to that, and I can let the Plaintiff respond after you've done  
23 that.

24 The hope is that -- that the Defendants will, through  
25 the meet and confer process, work out or at least narrow down



1 those issues down to if there are particular deadlines that  
2 need addressing, we'll do that. But I don't want to  
3 mechanically move the Markman back a certain number of months  
4 so that there will be the same gap there was in another case,  
5 because the -- the reason the Markman was set where it was had  
6 more to do with the availability of time on the Court's  
7 calendar than anything else.

8 So does that make sense?

9 MR. SMITH: It -- it does, Your Honor, and the -- and  
10 we have tried to look at adjusting the dates because what we  
11 would normally do in this situation is simply see if we could  
12 compress the dates to preserve the Markman and the trial  
13 setting.

14 The reason why we've had difficulty doing that here is  
15 because the Court's setting -- the January settings were --  
16 were several months quicker than -- than we had anticipated.  
17 They were several months quicker than -- than the settings, for  
18 example, in October or any of the months prior to that. So  
19 there wasn't room for us to compress the dates further down.  
20 We came up with a schedule that -- a schedule that -- that fit,  
21 but that was looking at the people that had notice of the  
22 status conference in January that had -- that got their  
23 infringement contentions back in December.

24 Again, the 431 case was brought in the day after  
25 that -- those status conferences, and we didn't get our

1 infringement contentions until February the 7th.

2           Now, again, normally, if we could have compressed the  
3 dates to get us on the same schedule, that's what we would be  
4 proposing. The problem is because the Markman was only a  
5 little over six months from the date of the status conference,  
6 it meant that we weren't able to simply push the dates back a  
7 little bit in order to get us folded in. So we're tight on our  
8 dates.

9           That, again, is not taking into account the parties  
10 that have signed the -- the motion asking for a status  
11 conference who won't come into the case until later. The --  
12 the latter two that come in in April will actually be coming in  
13 several days after invalidity contentions are due. So --

14           THE COURT: Well, when you say coming in, you're  
15 talking about filing an answer?

16           MR. SMITH: Yes, Your Honor.

17           THE COURT: Which I -- I mean, I understand that the  
18 answer has a certain role and everything, but I don't think  
19 that a delay in filing the answer prevents them from -- from  
20 doing what they need to do to -- to be ready for these  
21 subsequent events.

22           Now, the -- there is no necessary space between the --  
23 between the Markman and the trial. It's -- is the -- would  
24 giving you some relief on the Markman hearing take care of  
25 the -- the problems that you're addressing?

1 MR. SMITH: I'll -- I'll take that, Your Honor, but I  
2 looked at that because I was hoping we could adjust the Markman  
3 back a little bit and -- and still preserve the trial setting.  
4 And because the -- the Markman is in July and the trial setting  
5 is actually only five -- no, seven months after that, it was a  
6 little tight. We would take -- it would be preferable to have  
7 the Markman pushed back a little bit, as opposed to nothing,  
8 but I'm just cautioning the Court that because the dates are  
9 tight enough between the Markman and the trial, that's --  
10 that's why I'm not jumping at just we'll move the Markman back  
11 a little bit and we can still make the trial.

12 We would have to compress those dates in a way that  
13 I -- I'm concerned might be a little compressed.

14 THE COURT: Well, a little compressed is -- is not a  
15 problem.

16 MR. SMITH: Well, I think -- I think a 13-month trial  
17 setting for a case involving 130 parties, 2,700 anticipated  
18 fact witnesses to be considered in discovery, and 2,600 hours  
19 of -- or maybe I've got that wrong, maybe it's only 23 -- no,  
20 it is 2,600 hours of depositions by the Plaintiff is -- is a  
21 fairly aggressive schedule regardless. But we'll take what  
22 relief we can get, Your Honor.

23 THE COURT: Well, I'm -- I'm assuming that an awful  
24 lot of those witnesses and depositions would relate only to --  
25 to very few of the Defendants. I wouldn't expect that every

1 Defendant is going to try and participate in all of the  
2 witnesses of all the other Defendants, would you?

3 MR. SMITH: I -- I -- I agree with that, Your Honor.  
4 The problem is it's that the individual Defendants have to  
5 present those witnesses. So if -- if we've got 150 Defendants  
6 and the Plaintiff follows the form of -- of needing an  
7 anticipated three depositions per Defendant, it's not a matter  
8 of -- that we wouldn't all have to go out and take those  
9 depositions. It's a matter of everybody's going to have to  
10 produce their people and defend them.

11 And -- and -- and, again, this isn't the type of case  
12 where -- where I know that the -- the Plaintiff's counsel is  
13 just going to pick and choose. They're -- they're going to --  
14 they have a lot of ground to cover, and based on past history,  
15 I think they're going to try to cover that.

16 So when we talk about needing a lot of deposition  
17 discovery, that's not just speculation. That's informed --  
18 an in -- an informed opinion based on the prior history of the  
19 litigation.

20 THE COURT: Well, tell me, if each Defendant has to  
21 present three of its witnesses for deposition, how is that a  
22 burden on the Defendants?

23 MR. SMITH: It would mean three depositions a day for  
24 the next -- every day almost between now and --

25 THE COURT: I mean, the Plaintiff may have to

1 multi-track these depositions to get them done, but if the  
2 Defendants are just going to participate in their own  
3 witnesses's depositions, then how does that make it harder on  
4 the Defendants?

5 MR. SMITH: Because the Defendants in many cases  
6 are -- are represented by suppliers. The suppliers are having  
7 to cover -- the counsel for the suppliers are having to cover  
8 multiple of those Defendants at the same time. So it -- it --  
9 I mean, it can be done, Your Honor. It's just that's a reason  
10 why we need a little bit more time. Because while all of that  
11 is going between now and October, we've got claim construction  
12 to take care of and we've got all these individual parties that  
13 have to be taken care of. And -- and it -- my -- I anticipate  
14 that the Plaintiff's discovery will be somewhat fact intensive  
15 when it comes to depositions, simply because the number of --  
16 of Defendants.

17 THE COURT: Okay. All right. Thank you.

18 MR. SMITH: That's all I have, Your Honor.

19 THE COURT: All right.

20 MR. SMITH: Thank you.

21 THE COURT: Are there -- I guess before I hear from  
22 the Plaintiff, are there other Defendants who want to be heard  
23 also on -- on this issue? If so, I'll be happy to hear from  
24 them.

25 MR. HEIDRICK: If I -- if I could, Your Honor.

1 THE COURT: All right.

2 MR. HEIDRICK: My name, just briefly, Your Honor,  
3 is -- is Jay Heidrick. I represent Defendants in the 433 case,  
4 except for DATCU, Cherokee County, Veritext, and WCM Holdings,  
5 I believe.

6 I just wanted to add to what Mr. Smith said about the  
7 issue with the Plaintiff taking a number of deposition hours  
8 for the Plaintiff. You're correct on that. While that does  
9 address the -- that is the burden on the Plaintiff. What that  
10 does not allocate, though, is the availability for the  
11 Defendants, then, to go take their -- their depositions, to go  
12 present their case as far as the various defenses that they  
13 have.

14 There's a number of licensees that will be deposed.  
15 There are a number of witnesses from DataTreasury that are  
16 going to be deposed. There are prior art witnesses that are  
17 going to be deposed. So while you asked a lot of very good  
18 questions about the burden on the Plaintiff and while the  
19 Defendants would not have to attend each of those, that does  
20 not account for if the Plaintiffs are taking depositions every  
21 day between now and the close of discovery, the availability  
22 for us to go take some of those depositions that would be  
23 consolidated for all parties to participate in.

24 THE COURT: So what -- what I'm hearing from you is  
25 you're concerned that the Plaintiffs will not be available on

1 days when you want to take depositions because they're taking  
2 other depositions?

3 MR. HEIDRICK: Not only the Plaintiffs, Your Honor,  
4 but if -- if -- if some of the Defendants aren't available, as  
5 well, because they're in depositions with the Plaintiff on  
6 those days, as well, that leads to further -- further  
7 scheduling and problems along with that.

8 THE COURT: Uh-huh. All right. I --

9 MR. HEIDRICK: That's all I have, Your Honor.

10 THE COURT: -- I understand. Thank you, Mr. Heidrick.

11 MR. HURT: Good morning, Your Honor. This is kind of  
12 a moving target, so I don't know exactly how to respond.

13 I think on the scheduling point, the -- the five-month  
14 delay was -- this was the first time we sort of heard of it  
15 this morning, and I don't see -- and the Defendants don't seem  
16 to argue that the four or so banks that have yet to answer  
17 would be a reason to push the schedule. I think we've heard  
18 more of today is about how big this case is.

19 THE COURT: Well -- well, answer me one thing.

20 MR. HURT: Sure.

21 THE COURT: Did the Plaintiff just serve infringement  
22 contentions on February 7 on all of the 431 Defendants? Is  
23 that the -- do you agree that that was the date when that  
24 occurred?

25 MR. HURT: That's correct, with a few exceptions.

1 There's some Defendants in multiple cases, so some of the  
2 Defendants that were originally named in the 432 case and the  
3 433 case also received infringement contentions earlier. But  
4 the last round of infringement contentions went out on February  
5 7th.

6 And one of the things, Your Honor, that we've already  
7 done to sort of accommodate the perceived prejudice from that  
8 disclosure is we've agreed to allow the Defendants to push  
9 their initial disclosure and invalidity contentions --  
10 contentions' dates back by a few weeks, and there's an  
11 unopposed motion currently pending on that point.

12 I think, you know, for this case -- for these  
13 Defendants who have yet to answer to I guess follow along with  
14 what Court was saying or the Court had stated is we can work  
15 with each of those Defendants as needed to adjust the schedule.  
16 Things like invalidity contentions are common issues, and so  
17 those interests the other Defendants already in the case  
18 represent --

19 THE COURT: Well, tell me something --

20 MR. HURT: Sure.

21 THE COURT: -- Mr. Gilliland (sic), why are there  
22 Defendants who are still being served?

23 MR. HURT: So there's a few reasons for that. One of  
24 them is some of these Defendants were served in the wrong case.  
25 And so when we initially filed the lawsuit -- for example, we



1 thought someone was a Jack Henry customer when they weren't.  
2 They're a Fiserv customer. And it took us a while to figure  
3 that out, and so we moved them to the 431 case from the -- from  
4 another case.

5 In the other instance, what we've been trying to do is  
6 get service waivers and work with these Defendants so we don't  
7 have to formally serve them. Through that process, there's  
8 been a lot of back and forth, and we've kind of been getting  
9 the runaround. And we finally issued the summons earlier this  
10 month on a few of those Defendants.

11 The only Defendant that was recently served, due to  
12 our oversight, was Pilot Point Bank and Point Bank, which is  
13 a -- which we believe is a Fiserv customer and will be  
14 represented by Fiserv's counsel anyway as Fiserv has -- has  
15 been doing for the vast majority of the Defendants in the 431  
16 case.

17 THE COURT: Well, I can tell you that if you're going  
18 to file cases with this many Defendants, we expect you to -- to  
19 manage your cases in a way that you can accomplish --

20 MR. HURT: Yes, sir.

21 THE COURT: -- service on a more timely basis and move  
22 these along. I -- I -- I think at this stage of the case, we  
23 should not have Defendants who we're still waiting for service  
24 on.

25 MR. GILLILAND: Your Honor, I'm Derek Gilliland on

1   behalf --

2               THE COURT:   Oh, Mr. Gilliland.

3               MR. GILLILAND:  -- of Plaintiff, DataTreasury  
4   Corporation.  Mr. Hurt was at the microphone, and I just wanted  
5   to let the Court know that the delay in getting service on  
6   those Defendants falls squarely on my shoulders, and I hear the  
7   Court loud and clear.  And I believe we have it all taken care  
8   of now and will avoid any such problems going forward.

9               THE COURT:  All right.  Thank you, Mr. Gilliland.

10              And I apologize, Mr. Hurt, for --

11              MR. HURT:  Oh, I understand.

12              THE COURT:  I -- the reason -- one the reasons I want  
13   to -- I bring that up now is that I can see that in this case,  
14   there are going to be serious management issues on both sides,  
15   but certainly on the Plaintiff's side.  And the Court will  
16   expect that you're going to devote sufficient resources to --  
17   to this case to move it along despite the fact that we have as  
18   many Defendants as we have.  It -- it's not going to be an  
19   acceptable excuse that you're doing something else.  You're  
20   going to need to accommodate the needs of the Defendants to  
21   move forward on -- on many different tracks at the same time in  
22   order to get this case done and --

23              MR. HURT:  Well, yes, sir, and what our -- what we've  
24   done in the past is double track depositions.  We've had  
25   large -- so the DataTreasury litigation has been going on for

1 pretty much a decade, and we've double tracked depositions,  
2 and --

3 THE COURT: I don't know if double is going to do it,  
4 but anyway.

5 MR. HURT: Well, maybe triple track. But we will --  
6 we -- you know, the burden, I think, primarily does fall on us  
7 because it's ultimately our burden of proof in the lawsuit, and  
8 so we will do what we can to -- to continue to push the case  
9 forward.

10 THE COURT: But, you know, I'll say the same thing  
11 with respect to Defendants. If one firm is going to represent  
12 a great number of Defendants, it's going to be incumbent on  
13 that firm to devote the resources to -- to move the case on  
14 behalf of each of those clients on -- on a timely basis, even  
15 though they have joint representation.

16 But I am concerned about the fact that -- that the  
17 infringement contentions were just served on a number of the --  
18 it sounds like on the vast majority of the 431 Defendants. And  
19 whether that will require some relief on the Markman hearing is  
20 something the Court will have to look at.

21 Do you have any response on -- specifically on the  
22 request that the Markman hearing be moved?

23 MR. HURT: Yes. I don't think we need to move it. I  
24 mean, this -- these patents have gone through at least two  
25 Markman hearings and five claim construction orders and, you

1 know, a re-examination, as well. I can't imagine that there  
2 will be a significant Markman workload given that history. And  
3 so I don't see a -- a need to move the Markman hearing.

4 And in terms of -- in terms of -- of -- of the late --  
5 or the service of the infringement contentions on the 7th, the  
6 invalidity contentions day has been pushed back two weeks, and  
7 I do still think there's sufficient time to be able to get  
8 expert discovery done between the Markman and the trial date.

9 THE COURT: I just want to respond to that statement.  
10 I -- I don't think it has been pushed back two weeks.

11 MR. HURT: Oh, I -- I apologize, Your Honor. There's  
12 a motion pending.

13 THE COURT: Yeah. And it concerns me that the --  
14 there was an initial request to move it back, I think, to the  
15 14th. In order to try and keep this case moving, the Court set  
16 it for the 7th, and I believe on the 7th, we got a motion to  
17 move it back two more weeks. That -- obviously filing a motion  
18 like that on the last day puts the Court in the position of  
19 either causing what might be significant prejudice to one side  
20 or -- or moving the date, and the mere fact that it is  
21 unopposed should not be taken as a guarantee that it's going to  
22 be granted.

23 I think it should be obvious to everybody in this case  
24 that the Court takes the position that we have an independent  
25 interest in keeping this case moving.

1 MR. HURT: Yes, sir.

2 THE COURT: And just because the lawyers may not  
3 always share that does not mean that it's not going to  
4 continue.

5 MR. HURT: Right.

6 THE COURT: But in any event, so you're --

7 MR. HURT: I wanted to add one thing on the  
8 infringement contentions is -- is in substance, they're all  
9 virtually identical, and so we've served infringement  
10 contentions earlier in this case that contain the same accused  
11 instrumentalities as the one on the 7th, as well as with  
12 respect to Fiserv has been -- as this has come out in some of  
13 the briefing, and prior -- their cust -- Fiserv's customers  
14 have been involved in prior cases, and we filed similar  
15 infringement contentions in those cases. So February 7th  
16 wasn't the first time that at least Fiserv had notice of what  
17 was being accused in this lawsuit.

18 And on the unopposed motion point, I just wanted to  
19 clarify that we didn't -- did not join the motion to push the  
20 schedule back. We did not oppose the Defendants' motion and  
21 timely served our initial disclosures, along with our  
22 infringement contentions.

23 The only other point I think I'd like to make is there  
24 is an issue that came up about how WCM Holdings is not -- their  
25 answer date is not due until April. There's a little bit of a

1 clarification I'd like to make.

2           WCM Holdings is actually a party in the 433 case, as  
3 well as the 431 case. They answered already in the 433 case  
4 and were served infringement contentions in the 433 case back  
5 in January. And those infringement contentions identified  
6 Fiserv. And I believe based on when we did serve WCM Holdings  
7 in the 431 case, their answer is actually due in March. But  
8 it's the same attorney who has been involved in the 433 case,  
9 and they've had notice -- he has had notice for a number of  
10 months now that we were going to allege infringement of those  
11 banks based on their use of Fiserv. And that seemed to be the  
12 outlier of the dates that counsel for the Fiserv Defendants was  
13 talking about.

14           The remaining Defendants will all answer, I believe,  
15 this month.

16           THE COURT: Well, Mr. Hurt, tell me --

17           MR. HURT: Yes, sir.

18           THE COURT: -- if the infringement contentions that  
19 you have now served in the 431 case were substantially  
20 identical to those that you've served already, I guess, on  
21 December the 20th in the related cases, why did it take you  
22 until February 7th to get them out to the Defendants in the 431  
23 case?

24           MR. HURT: I -- I believe it was just the -- just  
25 under the -- the scheduling and actually getting the parties

1 together, and we had to identify -- so in substance, they're  
2 the same, but you have to identify -- each particular bank has  
3 a certain brand that they utilize, and it was just a matter of  
4 putting together thousands of pages of charts.

5 THE COURT: Which -- which means to me that at least  
6 on that task, you didn't devote the resources necessary to get  
7 it done on a more timely basis. If you're going to pursue  
8 this number of Defendants, it's not going to be an acceptable  
9 excuse that there are so many Defendants, we just couldn't get  
10 it done on time. That -- that's the -- a problem of your own  
11 making is that this date that these infringement contentions  
12 were served is not in accordance with the rest of the schedule  
13 in this DCO. And that's something that -- that we're going to  
14 now -- have to now deal with. But in any event, I -- I hope  
15 that -- that that won't happen in the future in this case.

16 MR. HURT: Yes, sir.

17 THE COURT: Okay. Mr. Smith, if -- if I give you some  
18 time now to meet with your counterparts on the other side on  
19 this issue of whether some relief on the Markman hearing will  
20 accommodate the compression of some of these earlier dates, do  
21 you think that would be helpful?

22 MR. SMITH: Yes, Your Honor, I believe that would be  
23 helpful. I have also lost -- oh, here we go.

24 Could I have the overhead for just a -- a second?

25 THE COURT: I think it's on.

1 MR. SMITH: Your Honor, the reason why I came up with  
2 the April the 8th date was because --

3 THE COURT: The April the 8th date for what?

4 MR. SMITH: For the -- the April the 8th date for  
5 the -- for the last two Defendants to appear. What I've put on  
6 the -- on the ELMO is a cell phone that has a picture of a  
7 February 5th letter from Mr. Gilliland to the counsel for the  
8 two Defendants we're talking about, Mr. Woody Glen. And the  
9 last sentence of that reads: Accordingly, please confirm by  
10 signing in the space below that you waive formal service of  
11 process for the above case, and in return, DataTreasury will  
12 agree that you have 60 days from today's date to appear or  
13 otherwise respond. And the date of the letter is the 5th of  
14 February, and the date of the signature is the 10th. So that's  
15 why we came up with that date. That's the date that we're  
16 working off there.

17 But, yes, Your Honor, we could work with the Plaintiff  
18 and come up with some dates if the Court gave us a different  
19 Markman date.

20 THE COURT: Well, what I'm going to ask you to do is  
21 to -- to do that now. I'm -- I'm going to take a recess and  
22 consider the effect of the dates. And I'd like to -- to get  
23 this resolved so that we can go forward with this docket  
24 control order promptly. And since I think the necessary  
25 parties are here right now, I'm going to just take a recess and



1 give you an opportunity to do that while --

2 MR. SMITH: Your Honor, is there a specific Markman  
3 date that the Court wants us to consider?

4 THE COURT: No, I just want to -- obviously, I want it  
5 to be the soonest date that will accommodate the things that  
6 have to be done beforehand. But I've -- I've got the ability  
7 to set a date where it needs to be.

8 MR. SMITH: Your Honor, if -- if we do that, if the  
9 date that we come up with may -- will need to accommodate the  
10 trial date, do we assume the same trial date, or can we  
11 assume -- or can we propose pushing the trial date out -- back  
12 some amount, as well?

13 THE COURT: At this point, I -- I don't want to  
14 consider moving that trial date, but I'll -- I will consider  
15 that after we address the -- the Markman date.

16 MR. SMITH: Okay. Thank you, Your Honor.

17 THE COURT: All right. We'll take a recess.

18 LAW CLERK: All rise.

19 (Recess.)

20 LAW CLERK: All rise.

21 THE COURT: Thank you. Please be seated.

22 Mr. Smith, what have you learned?

23 MR. SMITH: Your Honor, I'm cognizant that the Court  
24 said it's not necessarily going to accept the parties'  
25 agreements, but we have talked with the Plaintiff. And the

1 proposal that I believe the Plaintiff is in agreement with is  
2 that we would both be okay if the Court were able to move the  
3 Markman date approximately two months and move the trial date a  
4 corresponding two months.

5 MR. GILLILAND: DataTreasury is in agreement with that  
6 proposal, Your Honor.

7 THE COURT: All right. Based on the fact that the  
8 DCO that this was merged with or consolidated with was based on  
9 a date that is out of line with what actually happened, I --  
10 I'm willing to do that in this case. And so we will move the  
11 jury selection back to the April date, which I think was the --  
12 was that the 6th, what -- Becky, do you -- April the 15th?

13 Okay. And -- all right. That would be April the 13th  
14 as the jury selection date. And, let's see, we can look for a  
15 late August date for the Markman.

16 MR. SMITH: Your Honor, I believe the existing pro --  
17 Markman date the Court had given us previously was July the  
18 30th.

19 THE COURT: July 30. Oh, I'm sorry, you're right. So  
20 bad math.

21 So a -- a September date is where we should be  
22 looking. September 26th.

23 All right. September 26th for the Markman hearing.  
24 And -- all right. We will issue a docket control order with  
25 those changes in it, preserving the -- the spacing that's

1 already there with the other dates. And under the  
2 circumstances, we'll grant the separately pending motion to  
3 provide the additional time to get the disclosures in, although  
4 I do want to indicate that that doesn't mean that the Court  
5 will always grant a motion filed on the last day just because  
6 it's unopposed. But in any event, we'll do it on this  
7 occasion.

8 Mr. Smith, what else do --

9 MR. SMITH: Your Honor, I was just going to --

10 THE COURT: -- do you want us to take up?

11 MR. SMITH: I was just going to ask, did the Court  
12 want the parties to work on a proposed docket control order and  
13 submit that rather than have the Court enter it?

14 THE COURT: If there's a -- if you think there's  
15 something in it that would be helpful. I know you've already  
16 done that once, and we were going to try and keep your spacing,  
17 but if you want to -- if you can promptly get us something,  
18 then we'll wait for that.

19 MR. GILLILAND: Your Honor, just one point of  
20 clarification that if we're going to submit it, what date  
21 should we put for the pre-trial conference, or should we just  
22 leave that blank for the Court to fill in?

23 THE COURT: Why don't you go ahead and leave that  
24 blank, and we'll fill that in. That's fine. And we --  
25 frankly, we -- we'll adjust the dates there. We may end up

1 adjusting those dates from what you submit anyway. But I don't  
2 expect you to be able to figure that out. I understand.

3 I see this one had the pre-trial conference set for  
4 December the 30th.

5 MR. SMITH: Your Honor, I believe the -- the parties  
6 could have the Court a proposed order by Friday, if that's  
7 acceptable.

8 THE COURT: Okay. That will work. Anything else  
9 on -- on your side, Mr. Smith?

10 MR. SMITH: Nothing from the Defendants, Your Honor.

11 THE COURT: All right. Anything else for Plaintiff?

12 MR. GILLILAND: Nothing from the Plaintiff, Your  
13 Honor.

14 THE COURT: All right. Thank you, Mr. Gilliland.

15 In that case, we're adjourned. Thank you.

16 LAW CLERK: All rise.  
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## CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.